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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1282

WILLIAM RONALD WELCH,
PETITIONER,

v.

THE STATE OF OHIO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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THE STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

William Ronald Welch prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Ohio, entered in the above-entitled case on November 20, 1968 which order overruled Petitioner's motion for leave to appeal from the Court of Appeals for Montgomery County.

Citations to Opinions Below

The order of the Supreme Court of the State of Ohio as well as the opinion of the Court of Appeals for Montgomery County is reproduced in the appendix, infra.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

a. Was there effectuated a denial of Petitioner's constitutional rights by the admission of evidence obtained through an illegal and defective search warrant?

b. Did the admission of evidence of six alleged similar acts of the Petitioner's, for the purpose of bearing the burden of proof of the crime charged, prejudicially effectuate a denial of Petitioner's constitutional rights?

c. Were the instructions of the Court relative to the alleged similar acts of the Petitioner's so confusing and contradictory in terms and so absent of informative value as to unduly prejudice Petitioner's constitutional right to a fair and impartial trial?

d. Did the remarks of the prosecution, during summation to the jury, constitute harmful error within the purview of the Petitioner's constitutionally afforded rights?

e. Did the denial by the Trial Court of the Petitioner's motion for copies of Grand Jury testimony constitute prejudicial error?

Statement of the Case

On March 28, 1967 the Petitioner was tried in the Common Pleas Court of Montgomery County, Ohio upon a two count indictment charging the robbery of and the administration of poison to one Raymond A. Kantra. On April 6, 1967 the Petitioner was found guilty as charged and was subsequently sentenced to imprisonment at the Ohio

State Reformatory for a period of not less than one year nor more than 25 years on Count I and for a period of not less than two years, nor more than 15 years on Count II the sentences on both counts to run consecutively. Petitioner filed a timely Notice of Appeal and his Intention to Appeal the Verdict.

Motions to suppress were timely filed with regard to all evidence obtained through:

1. The execution of a Search Warrant (Count's Exhibit B, TR. 693) [1] of a 1962 red Cadillac owned by the Petitioner.

2. The execution of a Search Warrant (Court's Exhibit C, TR. 693) of the Petitioner's residence and unattached garage.

3. Objects obtained from the Petitioner's person.

These motions were denied and Petitioner's exceptions were saved.

Appeal was duly taken to the Court of Appeals of Montgomery County, Ohio, which appeal was denied by opinion of June 10, 1968. (p. 21) Petitioner's subsequent motion for leave to appeal to the Supreme Court of the State of Ohio was overruled without opinion on November 20, 1968. It is that order which Petitioner now seeks to have this Court review. The specific facts material to the consideration of the questions presented for review are set out in the respective supporting arguments.

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[1] "TR" refers to transcript of trial, Volumes II and III of the Bill of Exceptions.

Reasons for Granting the Writ

I. THERE WAS EFFECTUATED A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS BY THE ADMISSION OF EVIDENCE OBTAINED THROUGH AN ILLEGAL AND DEFECTIVE SEARCH WARRANT. THE SEARCH WARRANTS AND SUPPORTING DOCUMENTS OF WHICH PETITIONERS COMPLAINS ARE REFLECTED IN THE APPENDIX ON PAGES 25 THROUGH 38.

The following deficiencies are apparent upon the fact of the search warrants:

1. The spaces provided for the command of the Court on the search warrant for the Petitioner's automobile are completely silent. (p. 35) Revised Code Section 2933.25 specifically directs that said blanks be completed. It is a well-established mandate of the Supreme Court of Ohio that statutes providing for the execution of search warrants be strictly construed. *State* v. *Vuin,* 89 O.L.A. 193. If a search warrant not signed by a Judge, never issued, is void (*State* v. *Vuin supra*), then a warrant is equally void which reflects an absence of a Court's command.

2. The jurat on the search warrant and the Court's command were all undated. (p. 36) Surely this is a material portion of the warrant which must be completed prior to its execution by the issuing magistrate. Any other rule would leave the issuance of search warrants in the hands of petty officers and would effectively by-pass the magistrate's function in search warrant procedure.

3. The warrants are illegal on their face as permitting a general and exploratory search. Application was made in both warrants to search for four specifically enumerated articles and "all allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint #6-66, 9-66, 24-66, 29-66." At no time were these complaints annexed to the affidavit for an appropriate Court's

inspection. This attempt to incorporate into the search warrant articles allegedly appearing in non-attached cited complaints is contrary to the constitutional principal that the warrant must particularly describe the articles to be seized. This requirement is necessary to obviate general and exploratory searches and is designed to prevent the seizure of one item under a warrant describing another. As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant. *Marron* v. *U. S.*, 275 U.S. 192; *Wacksman* v. *Harrell*, 22 O.O. 2d 389. This incorporation by reference, without the complaint referred to being annexed to the application, precludes all reasonable boundaries of search and seizure. It, in effect, permits the police to seize, under a blanket incorporation by reference, any and all articles which might be reflected in private police files. Judicial scrutiny of official seizure is thereby obviated.

4. The affidavits and warrants refer to "Exhibit A" which bears no signature, and which does not conform with its referential description.

Both affidavits and warrants recited as to the facts upon which the Affiant's belief was based:

> "See attached sheet which is hereby incorporated herein by reference and has been previously marked Exhibit A dated 8/13/66."

In fact, Exhibit A is not a single sheet but rather three sheets which bear no signature. The lack of conformity of this attached exhibit with its identification by reference renders it inoperative. Under such circumstances the warrants are void, having been issued for lack of probable cause. *State* v. *Bartlett*, 28 O.O. 2d 90; *Cleveland Heights* v. *Spellman*, 34 O.O. 2d 405. The lack of signature thereon precludes the requisite that the facts be personally known

to the Affiant and not merely unreliable hearsay. *U. S.* v. *Ventresca,* 380 U.S. 102; *Akron* v. *Williams,* 23 O.O. 2d 466.

5. The warrants are void because Exhibit A attached thereto failed to indicate the dates of the four crimes alleged therein.

Exhibit A alleges four victims of crime. As to three, the only date given is the date that a complaint was filed with the Sheriff's office. There is no indication or allegation of the date of the crimes. As to the fourth, regarding a Mr. Mancoux, no date whatsoever is given. It is well-established that the facts of the offense referred to in the affidavit must not be remote in point of time. *Sgrow* v. *U. S.,* 287 U.S. 207; *Hamelman* v. *State,* 113 S.O. 2d 394. The duration between the commission of the offense and the swearing of the affidavit is critical to the determination of probable cause. Varon, *Searches, Seizures and Immunities,* Page 320. Where no date of the offense is given, the warrant must fail for lack of probable cause. *Rosencranz* v. *U. S.,* 356 F.2d 318.

6. The references of Paragraph 8 of Exhibit 8, annexed to the affidavits and warrants, are defective in that they fail to establish the reliability of the "confidential informant."

In order for the information of an informant to establish the affiant's probable cause, a "substantial basis" must appear for crediting this hearsay. *Jones* v. *U. S.,* 362 U.S. 257. The instant situation reflects a complete lack of "underlying circumstances" supporting the informant's conclusion, nor is there an "affirmative allegation" that the informant "spoke with personal knowledge" of the matter reported. Nor does there appear the standard. omni-present statement that the informant was "credible and reliable." *Aguilar* v. *Texas,* 378 U.S. 108.

In this regard, it is to be noted that Detective Tucker testified that he had no information that scopolamine had been used in either the Kantra, Moles or Richardson

matters. His belief that scopolamine was involved was derived only from tests conducted relative to Mr. Mancoux and from information that "other" people had been using scopolamine as a knock-out drug. In fact, the only information that Detective Tucker received from an informant was "that Mr. Welch, when he was in a place, did go to his car and come back."

Moreover, in the case of *United States* v. *Davis,* U.S.C.A. Seventh Circuit, September Term 1967 — April session 1968, decided September 18, 1968, the Court held that an affidavit for search warrant based upon a confidential informant must show the "underlying circumstances" by which the informant came by the knowledge which he claimed to have. In this instance, the only description of the informant is the adjective "confidential". Thus, the inadequacy of the affidavit in support of the search warrant is emphasized by the absence of underlying circumstances in support of the alleged knowledge of the informant. As a result thereof, said affidavit was insufficient to justify the issuance of the search warrant and the search and seizure made pursuant thereto was unlawful and in violation of the constitutional rights of the Petitioner. Any evidence obtained as a result thereof should have been suppressed. Thus, any evidence flowing from the search would have been excluded from the trial under the "fruit of the poison tree doctrine" expressed in *Silverthorne Lumber Co., Inc.* v. *U. S.,* 251 U.S. 385.

7. State's Exhibit 20, a Zippo cigarette lighter, identified by the witness Moles as his property, was the product of an illegal search and seizure.

Petitioner was arrested on August 13, 1966 at approximately 1:15 a.m. Exhibit A, attached to the affidavits for the search warrants, recites that the lighter was procured during a routine search of his person in the Montgomery County Jail. Detective Tucker testified that the lighter was

taken from the Appellant's personal effects at the police station at 12:25 p.m. August 13, 1966 some eleven hours after the Appellant's arrest. This item was seized without search warrant and without the Appellant's permission. In no way can it be argued that this item was incident to the search of Appellant in connection with the crimes for which he was arrested.

"It is very clear from the deicsions of the Supreme Court that the right to make a search without a warrant contemporaneously with an arrest is limited to a search for weapons, or for fruits of, or implements of the crime for which the arrest is made." *DiMarco* v. *Green,* 37 O.O. 2d 179; *State* v. *California,* 37 O.O. 2d 274; *Warden* v. *Hayden,* 18 L.Ed.2d 782.

It is to be further noted that the Petitioner had been searched at the scene of the arrest and the second search, conducted at the police station eleven hours after the arrest was a second search in incident to said arrest. A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Jones* v. *Louisiana,* 382 U.S. 36. The cigarette lighter was unrelated to the crimes charged. *Cooper* v. *California,* 17 L.Ed. 730.

8. The executed search of the Petitioner's residence was general and exploratory.

The police officers seized approximately fifty items listed on neither the warrant nor the affidavit nor its attached Exhibit A. Several of these items were introduced at trial against the Petitioner, none of which appeared in the affidavit or warrant. A watch, wallet and razor were identified by Mr. Kantra as his property. A bill fold was identified by Mr. Cutlip as his property. None of these items were referred to in the affidavit or the warrant. General and exploratory searches are condemned either with or without a search warrant. *Go-Bart Importing Co.* v. *U.S.,*

282 U.S. 344. Even where a search is not held to be general in scope, articles not described in the warrant may not be seized. *Marron* v. *U.S., Supra*; *Wacksman* v. *Harrell, Supra.*

9. There occurred two searches of Petitioner's residence, the second of which was illegal and not predicated upon a search warrant.

Petitioner's residence was searched on two different occasions. Once at approximately 4:30 p.m. on August 15, 1966 and a second time at 4:30 p.m. on August 16, 1966. The second entry and search, by virtue of which a far greater number of items was seized, was conducted without search warrant and was neither a continuation of the first search nor necessary under the circumstances. See *Varon, Search & Seizures and Immunities Page 385.* It should be further noted that the Petitioner was not present during this second search since he had been detained by the police, subsequent to his release by the Court, for "security reasons." These reasons are unfounded and not well taken and the detention of the Petitioner, in order to obviate his protest of this second search was without authority and illegal, further rendering this second search invalid. Indeed, the exploratory nature of this subsequent search is underlined by the fact that the police deemed it necessary to ascertain by telephone call from the Petitioner's residence whether or not two billfolds introduced into evidence were stolen property.

> "Eight or nine briefcases and what not. Just a whole slew of things which he (Detective Tucker) was checking on to find out who the owner was." *Summation of Prosecutor TR. 709.*

10. The search of the Petitioner's residence was in violation of Revised Code 2933.241.

The cited statute requires that an inventory of property taken under a warrant for search shall be given to the person from whose premises the property was taken along with a copy of the warrant. The Petitioner was not personally served with a copy of the warrant or the receipt, though copies were left at his residence. The Petitioner has maintained that he was illegally detained by the police. Had he been present the police would have been required to serve him with a copy of said warrant and receipt. This illegal detention of Petitioner cannot serve as the basis for the State authorities to do indirectly what they are legally forbidden to do directly. Petitioner's right to service and notice has been unconstitutionally by-passed.

11. The search of the Petitioner's automobile, even with warrant, was illegal because the police had illegally detained said automobile and were accordingly trespassers.

The Petitioner's automobile was originally towed to a private garage and thereafter impounded at the County Jail. There was no warrant to impound the automobile. The police have a right to remove a vehicle from a public road following an arrest of the driver, *Preston* v. *U.S.*, 376 U.S. 364, but this is merely as a convenience to the driver, and to remove an obstacle from the public road. The removal of the Petitioner's vehicle had been accomplished when taken to Andy's Garage. There was no reason to impound. The Petitioner maintains that this usurpation of custody was an unreasonable seizure.

Even if it be assumed that the police acted reasonably in impounding the vehicle at the County Jail, they could only maintain custody for a reasonable time. The Petitioner submits that a reasonable time expires when a person competent to drive the vehicle appears to obtain custody. One of Petitioner's counsel testified that he visited the Petitioner at the jail at approximately noon on August 13, 1966, and that his client asked him to obtain his automo-

bile keys from his personal effects and remove his vehicle from the jail to the Petitioner's home. (M.S. 123).[2] His counsel made a request for the keys and was refused. (M.S. 124).

The police cannot cure a defect of an illegal detention of the vehicle and its contents, which the Petitioner maintains was an illegal search and seizure, merely by subsequently obtaining a warrant. See *U.S.* v. *Radford*, 240 F. Supp. 76; *Preston* v. *U.S.*, supra; *Cooper* v. *Cal.*, supra.

When a seizure is wrongful, evidence obtained thereby cannot be subsequently introduced. To hold that the government can gain advantage from a wrongful seizure reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used be it in the way here proposed. The rights of an individual against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way. *Silverthorne Lumber Co., Inc. et al* v. *U.S.*, supra.

II. The Admission Of Evidence Of Six Alleged Similar Acts Of The Petitioner, For The Purpose Of Bearing The Burden Of Proof Of The Crime Charged, Did Prejudicially Effectuate A Denial Of Petitioner's Constitutional Rights.

Although the Petitioner was indicted for crimes against one person — Raymond Kantra — the Petitioner intro-

[2] "MS" refers to transcript of hearing on motions to suppress, Volume I of bill of exceptions.

duced evidence of six alleged similar acts. Of the 570 pages of the Petitioner's case, the vast majority was evidence elicited as to similar acts and matters related thereto. Under these circumstances, it is respectfully submitted, that it was impossible for the jury to impartially determine the guilt or innocence of the Petitioner for the crimes with which he was charged. So overwhelming was the evidence as to prior acts that the real issues of the case were far over-shadowed. See *State* v. *Herbert*, 8 O.O. 382. In effect, the jury was advised that since the Petitioner committed seven crimes in toto, he should certainly be convicted of at least one. Evidence of unlawful conduct, although material to the crime charged, should not be admitted if its admission diverts the case into a "trial within a trial" and in actuality exposes the Defendant to a conviction for a crime not charged. *Welch* v. *U.S.*, 371 F. 2d 287. Evidence disclosing commission of another offense should be excluded even though relevant, if the danger of prejudice in the use of this evidence is great and apparent. *Devour* v. *U.S.*, 368 F.2d 396.

It is clear that the evidence of alleged similar acts introduced by the Petitioner drew the attention of the jury away from the real issues involved and injected additional and confusing burdens upon the Petitioner. A person charged with a criminal offense has a right to assume that he will be tried for that offense only and will not be required to meet evidence of other criminal acts. This evidence resulted in casting such an atmosphere of aspersion and disrepute about the Petitioner so as to convince the jury that he was a habitual lawbreaker who should be punished and confined for the general good of the community. This procedure is both erroneous and prejudi-

The evidence as to similar acts was so extensive as to, in effect, tell the jury that the Petitioner had committed six prior offenses. *State* v. *Hirsch*, 1 O.O. 2d 349.

It is respectfully submitted that the probative value of such evidence has, in the instant situation, been far outweighed by its prejudicial effect and its admission in this case was violative of due process.

III. THE INSTRUCTIONS OF THE COURT RELATIVE TO THE ALLEGED SIMILAR ACTS OF THE PETITIONER WERE SO CONFUSING AND CONTRADICTORY IN TERMS AND SO ABSENT OF INFORMATIVE VALUE AS TO UNDULY PREJUDICE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

In charging the jury as to similar acts the Court simply quoted Revised Code Section 2945.59. The charge continued:

"Keep in mind that this evidence is not to be considered by you as substantive evidence or proof of the commission of evidence charged in the case; rather you are limited in your consideration of such evidence to the purposes specifically set forth in Section 2945.59, Revised Code just read to you by the Court."

Thus, the Court did not inform the jury upon which of the issues of evidence was to be considered. Can a jury be expected to distinguish between such technical criminal elements as motive, intent, absence of mistake, accident, scheme, plan or system? The charge, combined with the quantity of prior act evidence imported one unmistakable message, "Not only did the Petitioner commit the crime charged but the six others as well." How can a jury be expected to distinguish between the application of this evidence to the issue of guilt on one hand and to the technical elements of plan, system or intent on the other? Thus, the impact of the admitted evidence, fostered by the

Trial Court's charge, was compelling and mandatory in its effect.

IV. The Remarks Of The Prosecution, During Summation To The Jury, Did Constitute Harmful Error Within The Purview Of The Petitioner's Constitutionally Afforded Rights.

As a general rule, it may be said:

> A defendant on trial for any criminal charge is entitled to a fair trial. And one of the essential elements of a fair trial is that the district attorney should be scrupulous in the statements that he makes in his summation to the jury; that he should refer only to such facts as were established by the evidence and may make fair comment thereon; that he should not appeal to the prejudices of the jury, or seek to inflame the jury by his remarks; and that he should not make any statements that he knows are contrary to law.
> Rothblatt, *Handbook of Evidence in Criminal Trials*, Page 268.

The prosecutors in the instant case made several prejudicial remarks.

Mr. Niekamp:

> . . .We know how much scopolamine Kantra had.
> . . .
> Yes, I am talking about Raymond Kantra, the man who was reduced to a vegetable by this scopolamine. (TR. 702).

The prosecutor mis-stated the facts. Dr. Nelson, a biochemist who conducted tests of Mr. Kantra's blood and

urine and who found atrophine and scopolamine in the blood, but nothing in the urine (TR. 157, 171), testified that he was asked only to run a qualitative test (TR. 157), that the test he conducted would have indicated even traces, and would have reacted if only a normal dose were present. (TR. 170). He testified that there was no indication as to the amount present. (TR. 169-171).

Mr. Niekamp:

> You have got to understand some of the underlying principals in this case. You have got responsible, hard working business people coming into your community trying to carry on a living and that they are guests when they stay overnight in these motels here, of course, of our community. They have got to be protected. Just because they are outsiders you cannot slough them off. You people who will travel in other communities and who will want equal protection under the laws of this country. (TR. 710).

The jury is not to consider underlying principals but only the facts and the law as the law is charged by the Court. The prosecutor's reference that members of the jury will travel elsewhere was a plea "calculated to cause subjective identification with the crime on the part of the jurors," and to thereby appeal to motivations of hatred and revenge. *Adams* v. *State,* 192 So. 2d 762, 764 (Fla., 1966). See also, *State* v. *Jones,* 266 Min. 523, 124 NW 3d, 727.

Mr. Niekamp:

> Defense counsel have an opportunity to talk to you, but I would ask you to keep in mind one thing, when

> they do talk to you, remember, has anybody ever controverted these things, where they came from [the articles seized], or explained to you how they got there? We know how they got there. Based on the testimony in this case, has there been explanation of this? (TR. 710).

Who could explain the presence of these articles but the defendant? This statement was an obvious comment on the defendant's failure to take the stand in his own defense. *Griffin* v. *California,* 380 U.S. 609; *Desmond* v. *U.S.,* 345 F.2d 225 (CA-1, 1965).

In further support of the Petitioner's contention that the prosecutor's remarks can be reasonably interpreted to apply only to the Petitioner's failure to testify, it should be noted that the only two witnesses to which the remarks complained of could theoretically refer are Eva Green, and Margaret Craft, the friend and mother respectively of the Petitioner's. The circumstances of the case in no way impose upon them an obligation to know or explain the source of the articles seized. Moreover, the Petitioner, upon their cross-examination had ample opportunity to question them as to their knowledge or lack thereof regarding the seized articles but this was not done. Miss Green and Mrs. Craft did testify — Petitioner did not. It is respectfully submitted that the only reasonable inference to be drawn by the jury was that the prosecutor was commenting on the Defendant's failure to testify.

Indeed, the Court of Appeals for Montgomery County acknowledged that this particular assignment of error was deserving of comment. That Court, in holding no error, determined that the prosecution's remarks could be interpreted as referring to defense witnesses other than the Petitioner. As hereinabove stated, since the Respondent in

no way questioned these defense witnesses as to their knowledge or lack thereof with regard to the source of the articles seized, it is respectfully submitted that the rationale of the Court of Appeals is in error.

Mr. O'Brien:

> "I would like to start off by telling you in what esteem I hold these gentlemen. They really are fine gentlemen; they are hard working and very fine lawyers. I respect them both, I admire them both but unfortunately in this case they have had to sit here and waste our time for two weeks defending a man against whom the the evidence is so overwhelming that there really is no defense, and I would like to state further they have tried, they have done a fine job. I don't want you to judge them on the basis of this case. (TR. 737, 738). If we [referring to the resolve and integrity of the police and the prosecutor's office] get this guy, let's get him good. (TR. 733).

These comments in deprecation of defense counsel and the wasting of the Court's time are highly prejudicial. The continuing reference to "we" throughout Mr. O'Brien's argument (TR. 737-745), conferred as against the defendant, the combined integrity and good will of the police and prosecutor's officers.

Mr. O'Brien:

> We have been too good to this man. We have tolerated his activities too long. He started this trial along back last February. It is now April. It has taken us fourteen months to bring him to justice but we can't bring him to justice alone. The facts are here. The men who have testified in this case cannot bring him to justice alone. The judge can't. The only people that can do it

> are you sitting here right now. You sit here as individuals, and I know your names. I can show off and tell you your names, but that's not important. But you sit here wrapping the bundle. Not only can't we tolerate this, you as individuals can't tolerate it. The county can't either. This man is like a cancerous sore. We have to show people like him similarly inclined that we are not going to tolerate it. (TR. 745).

The prosecutor may not offer his personal integrity nor the integrity of the police as evidence against the defendant. Rothblatt, *Handbook of Evidence in Criminal Trials;* P. 269-70, and cases cited therein.

It is the contention of the Petitioner that the remarks of the prosecutor hereinabove referred to were not prejudicial in that witnesses called on behalf of the Petitioner could have offered pertinent explanations. This is ex post facto conjecture. The prosecutor's remarks were unequivocally directed to the Petitioner's failure to testify. Surely the jury could have drawn no other conclusion. Such remarks were violative of the constitutional protection against self-incrimination and were not susceptible to a curative charge by the trial judge. *State* v. *Davis,* 10 Ohio St. 2d 136.

V. The Denial By The Trial Court Of The Petitioner's Motion For Copies Of Grand Jury Testimony Did Constitute Prejudicial Error.

Following the cross-examination of Mr. Kantra, the complaining witness (TR. 91), and following the direct testimony of Mollie Taylor (TR. 116), a principal prosecution witness, the defense moved for copies of their Grand Jury testimony. These motions were denied. (TR. 91, 123-128).

The Petitioner maintains that prejudicial error was committed. The Supreme Court recently has shown strong inclination toward broad discovery in criminal cases. *Dennis* v. *U.S.*, 384 U.S. 855, 870, 873, and in *Youngblood* v. *U.S.*, 379, F.2d 365, 369-370 (CA 2, 1967), the Court held:

> Grand Jury minutes should be made available to a defendant for impeachment purposes after a witness has testified against him at his trial, disclosure being limited to the portion of the witnesses Grand Jury testimony which was the subject of direct examination. Under these circumstances, the traditional reasons for Grand Jury secrecy are largely inapplicable and we think that disclosure of Grand Jury testimony should be granted without requiring a showing of particularized need.

The denial of the motions for Grand Jury minutes violated the Petitioner's constitutional right to confront the witnesses against him and to prepare and present his defense.

The Petitioner's answer to this question of law inherently admits that the federal rule concerning the availability of Grand Jury testimony was violated. It suggests that discovery procedures could have been utilized to effectuate the result sought by motion. Moreover, Petitioner emphasizes a lack of contention by Petitioner as to the existence of any inconsistent statements by any witnesses and of any indication that the Grand Jury testimony would have been relevant or helpful to Petitioner's defense. How can one speculate on an unknown subject? It was precisely for the purpose of determining whether or not any discrepancy existed that said motion was proffered. The ultimate determination of whether or not the Grand Jury testimony would be helpful is of necessity predicated upon

an examination of said testimony. That which is unavailable cannot be scrutinized or argued upon. The mandate of the federal constitution dictates that this non-procedural rule of substance be adhered to by State as well as Federal tribunals; for an individual's constitutional rights are no less sacred in a forum encompassed by State jurisdictional boundaries.

Conclusion

For the reasons stated above, it is respectfully submitted that the order of the Supreme Court of the State of Ohio be reversed with directions that Petitioner be granted a new trial.

By his attorney:

F. Lee Bailey
One Center Plaza
Boston, Massachusetts 02108

APPENDIX A

IN THE COURT OF APPEALS, MONTGOMERY COUNTY, OHIO

No. 3181

STATE OF OHIO
PLAINTIFF, APPELLEE
v.
WILLIAM RONALD WELCH
DEFENDANT, APPELLANT

OPINION
Rendered on the 10th day of June, 1968.

Honorable Lee C. Falke, Prosecuting Attorney, Montgomery County, 41 North Perry Street, Suite 308, Dayton, Ohio 45402, By Mr. Lee C. Falke and Mr. Daniel J. O'Brien, Attorneys for Plaintiff, Appellee.

Mr. F. Lee Bailey, #1 Center Plaza, Boston, Mass. 02108 and

Mr. Jack H. Patricoff, 25 South Main Bldg., Dayton, Ohio 45402, Attorneys for Defendant Appellant.

KERNS, J.

The appellant herein, William Ronald Welch, was tried by jury and convicted under a two-count indictment charging him with the robbery of, and the administration of poison to, one Raymond A. Kantra.

From the judgment and sentence thereafter entered by the Court of Common Pleas of Montgomery County, Welch has appealed to this court on questions of law.

Although six specifications of error have been set forth, our review and analysis of the record fails to disclose that any error prejudicial to the substantial rights of the defendant-appellant intervened in the trial court as alleged

and argued under the first, third, fourth, fifth or sixth assignments of error. Nor do we find any particular defect in these areas which, upon reason or authority, was violative of Welch's constitutional rights.

However, the second assignment of error, which challenges the propriety of certain remarks made by the prosecution during summation, is deserving of comment.

Specifically, the record discloses the following statements:

"Mr. Niekamp: * * *

Defense counsel will have an opportunity to talk to you, but I would ask you to keep in mind one thing, when they do talk to you remember, has anybody ever controverted these things, where they came from, or explained to you how they got there? We know how they got there. Based on the testimony in this case has there been an explanation of this?"

Mr. Rion: Your Honor, I think this is getting highly close to the objectionable and close to the prejudicial area, and I think the court knows what he is getting at at this time. I think it is about as near a comment that the prosecution can make.

Mr. Niekamp: I think I know what he has in mind, but this is so far removed that—

The Court: The court will overrule the objection."

The defendant-appellant argues that the statement of the prosecution was based upon the defendant-appellant's failure to take the stand in his own defense, and violated this rule enunciated in *Griffin* v. *California,* 380 U.S. 609.

In the *Griffin case,* it was held that comment by a prosecuting attorney upon the failure of an accused to testify during his trial violated the accused's privilege against self-incrimination.

While it is concededly improper to comment on the failure of a defendant to testify in his own behalf, the difficulty arises in such cases where the prosecution uses

collateral innuendo which may or may not be interpreted as an attempt to circumvent the obvious purpose of this constitutional prohibition. However, a perusal of numerous cases fails to provide any authority for extending the application of the rule so far as suggested by the defendant-appellant in the present case.

Here, defense counsel made no formal objection to the statements, and this line of argument was not pursued by the prosecution after the admonition of defense counsel. Furthermore, the particular inquiry placed before the jury by the prosecution, while ineptly phrased, was nontheless susceptible to response by defense witnesses other than the defendant-appellant himself.

As we view the record, the remarks when placed in context, would be more apt to alert the mental processes of the jury to the defendant-appellant's lack of crucial evidence than to his failure to testify in his defense, and it is not improper to call attention to the weakness of the accused's case. Accordingly, the second assignment of error will likewise be overruled.

Upon reexamination of the entire record in this case with a view to treating the errors assigned cumulatively as they relate to the entire cause, we remain of the opinion that the defendant-appellant was afforded a fair trial.

The judgment will therefore be affirmed.

CRAWFORD, P. J. and SHERER, J., concur.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1968 TERM
TO WIT: NOVEMBER 20, 1968
No. 68-437

THE STATE OF OHIO,
CITY OF COLUMBUS.

STATE OF OHIO,
APPELLEE,
v.
WILLIAM RONALD WELCH,
APPELLANT.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Montgomery County

It is ordered by the Court that this motion is overruled.
COSTS:
Motion Fee, $20.00, paid by Jack H. Patricoff.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 20th day of November 1968.

Clerk

Deputy

APPENDIX C

AFFIDAVIT AND JOURNAL ENTRY FOR SEARCH WARRANT.

In the Court of Common Pleas, Montgomery County, Ohio
In the Matter of the Search of

The Premises known as 137 N. Smithville Rd. a 1-Story Frame House and its Unattached Garage in Montgomery County, Ohio.

The State of Ohio, Montgomery County, ss.

Before me Judge Robert L. McBride, Det. Rober Tucker personally appeared who, being first duly sworn according to law, deposes and says that he has good cause to believe and does believe that the offense of Burglary Inhabited Dwelling Night Season and Robbery have been committed and that the person responsible has never been placed in jeopardy therefore; that the following things and/or persons for which search authorization is sought, to-wit:[1] (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial H.D. or H.R. on the back and all allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66, 29-66 is/are concealed in[2] The premises known as 137 N. Smithville Rd. A one Story Frame house and it's unattached garage.

Affiant further avers the facts upon which such belief is based are: See attached sheet which is hereby incorporated herein by reference and has been previously marked Exhibit A. dated 8/13/66.

The things and/or person to be seized are: (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial H.D. or H.R. on the back and all al-

[1] Describe the things or persons for which search is sought.
[2] Describe the place of concealment.

legedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery[3] Complaint No. 6-66, 9-66, 24-66, 29-66.

(s) DET. ROBERT TUCKER
Det. Robert Tucker
Affiant

Sworn to before me and subscribed in my presence this day of , 196 .

(s) Signature Illegible

JOURNAL ENTRY

In the Court of Common Pleas, Montgomery County, Ohio

In the Matter of the Search of The Premises as Known as 137 N. Smithville Rd. A 1 Story Frame House and It's Unattached Garage in Montgomery County Ohio.

This matter came on for consideration this day of , 19 , on the affidavit of for a search warrant and the evidence, and it appears to the Court that there is probable cause that the following persons or things, to-wit: (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial on back H.D. or H.R. any and all Allegedly stolen merchandise listed in Montgomery County Sheriff' Office Robbery Complaint No. 6-66,9-66, 24-66, 29-66, are concealed in The premises known as 137 N. Smithville Rd., A one Story Frame house and its unattached garage; that the offense described in the affidavit

---

[3] If search is to be made in the nighttime, insert: "Affiant further says there is urgent necessity for a search in the nighttime for the reason that . . . ."

has been committed; that the premises and things to be searched are within the jurisdiction of this Court;[1]

It is therefore ordered that a search warrant issue accordingly, and that the Sheriff make return thereof not later than three days from the issuance of said warrant.

(s) JUDGE MCBRIDE
Judge McBride

EXHIBIT A

1. That a 1962 Red Cadillac 2 door, Ohio 1966 License No. 4009 N.R. belongs to William R. Welch, and is presently located in The Montgomery County Jail Garage.

2. That William R. Welch presides at 137 N. Smithville Road, a one story frame house with an unattached garage which is located within Montgomery County, Ohio.

3. That on Montgomery County Sheriff's complaint No. 6-66, dated February 24, 1966, William Welch has been identified by Ray Kantra as the last person with Ray Kantra just prior to Ray Kantra losing consciousness as a result of being drugged and then and there being robbed of certain personal items and cash. The 1962 Red Cadillac 2 door automobile has also been itentified by Mr. Kantra as the auto being used by William Welch on this occasion.

4. That on Montgomery County Sheriff's complaint No. 9-66 dated March 16, 1966, one, John C. Moles, has identified William R. Welch as one of the persons at the scene at the time he was beaten and robbed of certain personal items, including a Longine Wristwatch and a Zippo Cigarette Lighter with the inscription J. C. Moles and the telephone number 849-0602 appearing thereon. Mr. Moles can also identify the 1962 Cadillac of Mr. Welch as the auto being used by Mr. Welch on or about March 16, 1966.

---

[1] If applicable, insert: "that there is urgent necessity for search of said premises in the night season"—otherwise, the warrant will issue for service in the daytime.

5. That on the morning of 8/13/66 William Welch was stopped for speeding and subsequently arrested and booked for investigation of driving while intoxicated. That in a rountine search of his person the Montgomery County Jail, a Zippo Cigarette Lighter with the inscription J. C. Moles and the telephone no. 849-0602 was procurred from the person of William R. Welch.

6. That on Montgomery County Sheriff's Office complaint number 24-66 dated July 10, 1966, one Howard Richardson has identified William Welch as being with Mr. Richardson just prior to and at the time Mr. Richardson began losing his faculties as the result of being drugged. He can also identify William Welch as the person who attempted to remove a Accutron Wrist Watch from the wrist of Mr. Richardson. At this time and place Mr. Richardson can also identify the 1962 Cadillac of William Melchas.

7. That on Montgomery Sheriff's office complaint No. 29-66, Wayne Mancoux identified William Welch as being in the car. Mancoux just prior to and at the time of a loss of consciousness by Mr. Mancoux caused by the administration of a certain drug, to-wit: Scopalimine to Mr. Mancoux. Mr. Mancoux lost a certain billfold, a Sears Credit Card, a book of checks on The First National Bank of Mundelein, Illinois, and one key to room 126 of The Sheridan Motel (a room rented to Mr. Mancoux by The Sheridan,) a 19" Motorola T.V. set, Serial No. N. 740250 was subsequently stolen from Room 126 of The Sheridan Motel on the same night or early the next morning, while Mr. Mancoux was disabled from the effects of this drug.

8. That the Montgomery County Sheriff's Office has received information from a confidential informant that William Welch keeps some form of "Knockout drops" in his automobile and at his place of residence.

9. That a Laboratory Analysis of a blood and urine sample of Wayne Mancoux on 7/12/66 indicated that pre-

sence of the drug Scopolamine in the blood and urine of Mr. Mancoux at the time of the examination.

SEARCH WARRANT

Common Pleas County Court,
Montgomery Area — District
....., Ohio

No. .....

The State of Ohio, Montgomery County, ss.

To the Sheriff—Constable of Montgomery, GREETINGS:

Whereas there has been filed with me an affidavit, the substance of which is as follows:

The State of Ohio, Montgomery County, ss.

Before me Judge Robert L. McBride

personally appeared Det. Robert Tucker *who being duly sworn according to law, deposes and says that on or about the 15th day of August 1966, at the County of* Montgomery, *one* William Ronald Welch *had and still has in his possession, the following personal property for which search authorization and seizure is sought, to-wit:* (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial H.D. or H.R. on the back and any and all Allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66 and 29-66

knowing the same

to have been stolen

and that said complainant believes and has good cause to believe that said property, or some part thereof, is concealed in The premises known as 137 N. Smithville Rd. A 1-Story Frame House and its unattached Garage in Montgomery County Ohio

Complainant further avers the facts upon which such

belief is based are: See attached Sheet which is incorporated herein by reference and has been previously marked Exhibit A., dated 8/13/66.

(s) DET. ROBERT TUCKER
Affiant

Sworn to before me and subscribed in my presence this day of , 19 .

(s) W. W. BRAUNSCHWAJER

These are therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the[1] daytime into The Premises known as 137 N. Smithville Rd. A 1 Story Frame House and its unattached Garage of the said William Ronald Welch of the of in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to-wit:

A Scopolamine any form (2) 19" Motorola T.V. Serial No. N. 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial on back H.D. or H.R. and any all all Allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66 29-66

and that you bring the same or any part thereof, found on such search

forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand and the seal of said Court this day of , 19 :

(s) W. W. BRAUNSCHWAJER

---

[1] Describe the things or persons for which search is sought.

RETURN

Dayton, Ohio, August 17, 1966.

Received this writ on the 15th day of August, 1966, at 3:50 o'clock P.M., and pursuant to its command I executed the same on the 15th day of August, 1966, by searching the premises therein described for the person and/or things therein set forth, in the[1] *day time of said day whereupon I did seize the following things and/or persons, to-wit: (See attached lists marked exhibits A & B) and now have them before the Court.*

By: (s) B. L. KEITER
Sheriff—Constable
DET. TUCKER

---

[1] "day or night."

APPENDIX D

AFFIDAVIT AND JOURNAL ENTRY FOR SEARCH WARRANT

In the Court of Common Pleas,
Montgomery County, Ohio
No. .....

AFFIDAVIT

In the Matter of the Search of
A 1962 Red Cadillac 2 Door Ohio
1966 License No. 4009NR. Owned
by William R. Welch

The State of Ohio, Montgomery County, ss.

Before me Judge Robert L. McBride

personally appeared

Det. Robert Tucker *who, being first duly sworn according to law, deposes and says that he has good cause to believe and does believe that the offense of*

Burglary Inhabited Dwelling Night Season and Robbery

have *been committed and that the person responsible has never been placed in jeopardy therefore; that the following things and/or persons for which search authorization is sought to-wit:*[1] (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron wrist watch stolen initial H.D. or H.R. on the back (4) Any and all allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66, 29-66

is/are concealed in[2] A 1962 Red Cadillac 2 Door Ohio 1966 License No. 4009NR Owned by William R. Welch —

---

[1] "day or night."

[2] Describe the place of concealment.

Affiant further avers the facts upon which such belief is based are: See Attached sheet which is hereby incorporated herein by reference and has been previously marked Exhibt A. and dated 8/13/66

The things and/or person . . to be seized are (1) A 1962 Red Cadillac 2 door Ohio 1966 License No. 4009 N R. (2) Scopolamine in any form (3) 19" Motorola T.V. Serial No. N 740250, Key to Room 126 Sheridan Hotel Accutron Wrist watch with initial H.D. or H.R. on back and all allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66, 29-66

(s) DET. ROBERT TUCKER
Affiant

Sworn to before me and subscribed in my presence this 15 *day of* August, *1966.*

W. W. BRAUNSHWAGER
In the Court of Common Pleas,
Montgomery County, Ohio

In the Matter of the Search of
A 1962 Red Cadillac 2 Door Ohio
1966 License No. 4009 NR Owned
by William R. Welch

. . . . . .

. . . . . .

No. . . . . .

JOURNAL ENTRY

This matter came on for consideration this 15th *day of August, 1966, on the affidavit of for a search warrant and the evidence, and it appears to the Court that there is probable cause that the following persons or things, to-wit:* (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist Watch with initial H.D. or H.R. on the back and any and all Allegedly stolen

merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66, 29-66
are concealed in A 1962 Red Cadillac 2 door Ohio 1966 License No. 4009 NR., Owned and operated by William R. Welch
; that the offense described in the affidavit has been committed; that the premises and things to be searched are within the jurisdiction of this Court;[1]

It is therefore ordered that a search warrant issue accordingly, and that the Sheriff make return thereof not later than three days from the issuance of said warrant.

ILLEGIBLE
Judge

[1] If applicable, insert: "that there is urgent necessity for search of said premises in the night season"—otherwise, the warrant will issue for service in the daytime.

EXHIBIT A

Received this writ on the .....day of....., 19 ....,
at.....o'clock ....M., and pursuant to its command
I executed the same on the .....day of ....., 19..,
by searching the premises therein described for the person and/or things therein set forth, in the[1] *..... time of said day*
whereupon I did seize the following things and/or persons, to-wit:

and now have them before the Court.

.....
Sheriff—Constable

.....

.....

1. That a 1962 Red Cadillac 2 door, Ohio 1966 License

[1] "day or night."

No. 4009 N.R. belongs to William R. Welch, and is presently located in The Montgomery County Jail Garage.

2. That William R. Welch presides at 137 N. Smithville Road, a one story frame house with an unattached garage which is located within Montgomery County, Ohio.

3. That on Montgomery County Sheriff's complaint No. 6-66, dated February 24, 1966, William Welch has been identified by Ray Kantra as the last person with Ray Kantra just prior to Ray Kantra losing consciousness as a result of being drugged and then and there being robbed of certain personal items and cash. The 1962 Red Cadillac 2 door automobile has also been itentified by Mr. Kantra as the auto being used by William Welch on this occasion.

4. That on Montgomery County Sheriff's complaint No. 9-66 dated March 16, 1966, one, John C. Moles, has identified William R. Welch as one of the persons at the scene at the time he was beaten and robbed of certain personal items, including a Longine Wristwatch and a Zippo Cigarette Lighter with the inscription J. C. Moles and the telephone number 849-0602 appearing thereon. Mr. Moles can also identify the 1962 Cadillac of Mr. Welch as the auto being used by Mr. Welch on or about March 16, 1966.

5. That on the morning of 8/13/66 William Welch was stopped for speeding and subsequently arrested and booked for investigation of driving while intoxicated. That in a routine search of his person the Montgomery County Jail, a Zippo Cigarette Lighter with the inscription J. C. Moles and the telephone no. 849-0602 was procured from the person of William R. Welch.

6. That on Montgomery County Sheriff's Office complaint number 24-66 dated July 10, 1966, one Howard Richardson has identified William Welch as being with Mr. Richardson just prior to and at the time Mr. Richardson began losing his faculties as the result of being drugged. He can also identify William Welch as the person who attempted to re-

move a Accutron Wrist Watch from the wrist of Mr. Richardson. At this time and place Mr. Richardson can also identify the 1962 Cadillac of William Melchas.

7. That on Montgomery Sheriff's office complaint No. 29-66, Wayne Mancoux identified William Welch as being in the car. Mancoux just prior to *and* at the time of a loss of consciousness by Mr. Mancoux caused by the administration of a certain drug, to-wit: Scopalimine to Mr. Mancoux. Mr. Mancoux lost a certain billfold, a Sears Credit Card, a book of checks on The First National Bank of Mundelein, Illinois, and one key to room 126 of The Sheridan Motel (a room rented to Mr. Mancoux by The Sheridan,) a 19″ Motorola T. V. set, Serial No. N. 740250 was subsequently stolen from Room 126 of The Sheridan Motel on the same night or early the next morning, while Mr. Mancoux was disabled from *the* effects of this drug.

8. That the Montgomery County Sheriff's Office has received information from a confidential informant that William Welch keeps some form of "Knockout drops" in his automobile and at his place of residence.

9. That a Laboratory Analysis of a blood and urine sample of Wayne Mancoux on 7/12/66 indicated the presence of the drug Scopolamine in the blood and urine of Mr. Mancoux at the time of the examination.

SEARCH WARRANT

Common Pleas County Court,
Montgomery County Area—District,
....., Ohio

No. .....

The State of Ohio, Montgomery County, ss.

To the Sheriff—Constable of Montgomery, GREETINGS:

Whereas there has been filed with me an affidavit, the substance of which is as follows:

The State of Ohio, Montgomery County, ss.

Before me Judge Robert L. McBride
Detective Robert L. Tucker

personally appeared
who being duly sworn according to law, deposes and says that on or about the 15th day of August 1966, at the County of Montgomery, one William Ronald Welch
had and still has in his possession, the following personal property for which search authorization and seizure is sought, to-wit: (1) Scopolamine in any form (2) 19" Motorola T.V. Serial No. N 740250 (3) Key to Room 126 Sheridan Hotel (4) Accutron Wrist watch with initial H.D. or H.R. on the back any and all Allegedly stolen merchandise listed in Montgomery County Sheriff's Office Robbery Complaint No. 6-66, 9-66, 24-66, 29-66
knowing the same
to have been stolen
and that said complainant believes and has good cause to believe that said property, or some part thereof, is concealed in A 1962 Red Cadillac 2 door Ohio 1966 License No. 4009NR

Complainant further avers the facts upon which such belief is based are: See attached sheet which is hereby incorporated herein by reference and has been previously marked Exhibit A. and dated 8/13/66

(s) Det. Robert Tucker
Affiant

Sworn to before me and subscribed in my presence this 15th day of August, 1966.

(s) W. W. Braunschwajer

These are therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the [1] into

[1] "daytime" or "nighttime" as the case may be.

of the said of the of in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to-wit:

and that you bring the same or any part thereof, found on such search forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand and the seal of said Court, this day of , 19 .

By ILLEGIBLE

RETURN

....., Ohio, ..., 19.....

APPENDIX E

REVISED CODE OF OHIO, SECTION 2933.25

Form of search warrant.

Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:

State of Ohio, ... County, ss:

To the sheriff (or other officer) of said County, greeting:

Whereas there has been filed with me an affidavit, of which the following is a copy (here copy the affidavit).

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of the said ..... of the township of ..... in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to wit: here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E.F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this ..... day of .....

A.B., Judge, County Court

REVISED CODE OF OHIO, SECTION 2933.241

Inventory of property taken.

The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. (130 v H 418. Eff. 10-14-63)

REVISED CODE OF OHIO, SECTION 2945.59

Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake, or accident on his part, or the defendant's scheme, plan, or system in

doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

SUPREME COURT, U. S.

FILED
MAY 23 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1282

WILLIAM RONALD WELCH,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio
41 N. Perry Street
Dayton, Ohio
Counsel for Respondent

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1282

WILLIAM RONALD WELCH,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as contained in Petition For A Writ of Certiorari heretofore filed by petitioner.

I. ANSWER TO PETITIONER'S ALLEGATION THAT THERE WAS EFFECTUATED A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS BY THE ADMISSION OF EVIDENCE OBTAINED THROUGH AN ILLEGAL AND DEFECTIVE SEARCH WARRANT.

FACTS

The petitioner was arrested on Saturday, August 13, 1966, at about 1:00 a.m. by Montgomery County Sheriff's

Deputy, Robert Massie. (T.R. 550)[1] He was arrested for speeding and driving a motor vehicle while under the influence of alcohol. (M.S. 77)[2] (T.R. 550) Petitioner pleaded guilty to the speeding charge and pleaded guilty to "reckless operation of a motor vehicle" which is a lesser and included offense of driving a motor vehicle while under the influence of alcohol. (M.S. 182) Petitioner's automobile was towed to the Montgomery County Jail garage parking lot and a sign was placed on its saying, "Do not touch." (T.R. 320) Detective Tucker was not on duty at that time. On Monday, August 15, 1966, when Detective Tucker returned to duty he appeared before Robert L. McBride, Judge, Common Pleas Court, Montgomery County, Ohio, and requested authority to search petitioner's 1962 red Cadillac and his residence, located at 137 N. Smithville Road, Montgomery County, Ohio. Judge McBride issued warrants for the search of petitioner's automobile and residence after a consideration of Detective Tucker's affidavits and exhibits which were incorporated therein and attached thereto. Before issuing the search warrants, Judge McBride had made a finding that probable cause existed for the warrants. Judge McBride affixed his signature to the journal entries and search warrants. His signatures are legible.

Later on August 15, 1966, Detective Tucker executed the search warrants and as a result of the search of petitioner's residence he found an Accutron wrist watch with initials H. D. appearing on the back of the watch just as he had claimed in his affidavits and warrants. Also, Detective Tucker had discovered various billfolds, each with different identifications and also several watches, which

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[1] "T.R." refers to transcript of trial, Volumes II and III of the Bill of Exceptions.

[2] "M.S." refers to transcript of hearing on motions to suppress, Volume I of Bill of Exceptions.

property he knew was stolen merchandise from the various complaints which were made and filed at the Montgomery County Sheriff's Office by other victims of robberies. The receiving or concealing of stolen property constitutes a criminal offense under the laws of the State of Ohio. Those items were confiscated by Detective Tucker. A search of petitioner's automobile produced several bottles of scopolamine which had been mentioned in the same affidavits of Detective Tucker.

Prior to the trial, petitioner through counsel filed several motions to suppress evidence attacking the propriety and issuance of the search warrants. The Trial Court conducted an extensive, independent hearing on these issues all of which appears in the Transcript of Hearing on Motions to Suppress. Sworn testimony was taken from nine witnesses after which the Court overruled petitioner's motions as not being well taken. During the trial the Court was called upon to rule on the admissibility of the items of evidence which had been obtained as a result of Detective Tucker's search of petitioner's automobile and residence.

This entire matter was before the Court of Appeals for Montgomery County, Ohio, in Case No. 3181, at which time petitioner attacked the propriety, issuance and execution of the search warrants in question. The Appellate Court ruled that after a complete review and analysis of the record it failed to disclose any error prejudicial to the substantial rights of the defendant-appellant nor did it find any particular defect in this area which upon reason or authority was violative of petitioner's constitutional rights. The Supreme Court of Ohio agreed with the Appellate Court's reasoning when it declined to accept the matter for review inasmuch as no substantial constitutional question was involved therein.

REPLY TO PETITIONER'S ARGUMENTS

Petitioner complains that several spaces were left blank on the search warrant, however, the omissions, if any, were ministerial in nature and a technical irregularity which do not go to the substantive issue. Petitioner cites *State* v. *Vuin*, 89 O.L.A., 193, however, that case has no application herein inasmuch as the issuing magistrate failed to sign the search warrant which is not the situation in the instant case. The court in *State* v. *Laws*, 233 A. 2d 633, stated that search warrants are to be read sensibly rather than hypercritically and should be deemed legally sufficient so long as they contain factual assertions which would lead a prudent man to believe that a crime had been committed and that the evidence, fruits or instrumentalities of the crime were at the place sought to be searched. Also, assuming some unexecuted blanks, the Court is reminded that a judicial preference is accorded to searches under a warrant. *Jones* v. *United States*, 80 S. Ct. 725; *United States* v. *Ventresca*, 85 S. Ct. 741. Further, *United States* v. *Ventresca* appears to be a specific mandate for the proposition that the affiant may affix and attach a page or pages to his affidavit, upon which he has stated various facts in detail alleging probable cause for the issuance of the warrant and to incorporate same by reference to the affidavit.

Petitioner complains that the affidavits and search warrants are defective in that they fail to establish the reliability of the "confidential informant." Petitioner neglects to inform this court of the remaining eight or nine statements of fact or averments of probable cause which are contained in Exhibit A. The facts and information contained in Exhibit A were in the personal knowledge of Detective Robert L. Tucker, the affiant.

Petitioner claims that Detective Tucker had no information that scopolamine had been used in either the Kantra,

Moles or Richardson matters and that his belief that scopolamine was involved was derived from tests conducted relative to Mr. Marcoux. The tests conducted relative to Wayne Marcoux and the positive results of scopolamine were made known to Detective Tucker several weeks prior to the issuance of the search warrants. William J. Miller, the chemist who conducted these tests did so on July 21, 1966. (T.R. 341) Further, Detective Tucker stated that he knew in February of 1966 that examinations of Ray Kantra disclosed that he had been under a Belladonna type drug. (M.S. 21) Scopolamine is an alkaloid of that drug. The search warrants were issued on August 15, 1966. We respectfully refer the Court to the testimony of Robert L. Tucker to determine what he knew prior to his obtaining the search warrants rather than relying on petitioner's brief. See (M.S. 16 thru 61)

Petitioner complains that State's Exhibit 20, a Zippo cigarette lighter, identified by witness John C. Moles as his property was the product of an illegal search and seizure. This appears to be an attack on the administrative, inventory book-in procedure, which every jail must use. The purpose of the procedure is to safeguard the property of the suspect. He is given a receipt for his property as he enters the jail. This is for the protection of the suspect but it unavoidably works against him when the fruits, instrumentalities or a link to previous crimes are provided to the police. This procedure and its legality are universally recognized and approved. *State* v. *Darabcsek*, 412 S.W. 2d 97; *Arabia* v. *State*, 421 P. 2d 952; *Baca* v. *People*, 418 P. 2d 182. State's Exhibit 20, was identified by the witness, John C. Moles. The name "J. C. Moles" and telephone number "849-0602" was inscribed thereon. (T.R. 435) Detective Tucker obtained the cigarette lighter on August 13, 1966. Detective Tucker

knew that State's Exhibit 20 was stolen property in March of 1966. (M.S. 23)

Petitioner further complains of an exploratory search; we submit he misses the point entirely. Detective Tucker was lawfully on the premises in the execution of the search warrants and discovered some of the items for which he was searching. (M.S. 57) (T.R. 409) He had been assigned all the drug-robbery complaints and when he discovered other stolen property being concealed by petitioner, and this being a criminal offense under the Ohio Statutes, it became his duty of confiscate this stolen merchandise. (M.S. 60)

Petitioner also claims that his residence was searched on two different occasions. Detective Tucker along with other personnel from the Montgomery County Sheriff's Office began their search of petitioner's residence on August 15, 1966, at 4:30 p.m. and stayed about two hours. (M.S. 51) The search of the house was not completed at that time but was continued and completed the next day or on August 16, 1966. (M.S. 57, 58, 59) (M.S. 83, 89). The officers had a warrant which authorized a search of the premises during the daytime. (M.S. 89) Therefore, the officers did not conduct two independent searches of petitioner's premises but actually began the daytime search on August 15, 1966, and continued and completed the search the following day.

Finally, on page 9 of petitioner's brief there appears the following quotation:

> "Eight or nine briefcases and what not. Just a whole slew of things which he (Detective Tucker) was checking on to find out who the owner was." Summation of Prosecutor T. R. 709.

We submit to this Court that the statement which has been taken out of context, was fair comment on the evidence. See cross-examination of Detective Robert L.

Tucker by petitioner's trial counsel. (T.R. 410 thru 422) This testimony or evidence which indicates that petitioner had committed other crimes (receiving or concealing stolen property) was not elicited nor introduced by the State but by the petitioner himself. The only evidence which was introduced at petitioner's trial by the State of Ohio was evidence which was directly responsive and relevant to the issues or charges for which petitioner was standing trial, including exhibits and testimony which indicated that petitioner may have perpetrated like or similar acts upon other citizens.

Further, respondent maintains that Detective Tucker did not have to know positively who the individual, legal owner was of each and every personal item of property such as watches, keys, jewelry, briefcases, billfolds with different identifications therein to know or to have reasonable grounds to believe that they were stolen property. These items of property were discovered in petitioner's residence in the same area and adjacent to other items which had been reported stolen to the Montgomery County Sheriff's Office and Detective Tucker. Some of the property had been listed in the affidavits and search warrants.

II. ANSWER TO PETITIONER'S ALLEGATION THAT THE ADMISSION OF EVIDENCE OF SIX ALLEGED SIMILAR ACTS OF THE PETITIONER FOR THE PURPOSE OF BEARING THE BURDEN OF PROOF OF THE CRIME CHARGED, DID PREJUDICIALLY EFFECTUATE A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner says in his brief that the vast majority of the 570 pages of testimony found in the transcript related to evidence of like or similar acts of the petitioner. However, if one would objectively appraise the recorded testimony of Ray Kantra, James T. Smith, Mollie Taylor, Gilbert Nelson, Andrew Papanek, Robert Tucker, William J.

Miller, Frank Cleveland, Robert Massie, and all the discussions with the Court and counsel which took place out of the presence of the jury and which was not evidence, one would find that the vast majority of the 570 pages did in fact relate to the charges for which the petitioner was convicted and not like or similar act evidence.

Further, the respondent submits that the number of pages of recorded testimony has no bearing upon the issue involved especially when considering the Trial Court's charge to the jury relating to the proper use of the evidence. This charge appears under Respondent's Answer III in this brief. The Trial Court instructed the jury that they could not consider this evidence as proof that the defendant committed the offenses for which he is now on trial. (T.R. 204, 205) (T.R. 268, 269) (T.R. 539, 540) (T.R. 759)

There are numerous citations upholding the use and propriety of Ohio Revised Code 2945.59. *State* v. *DeRighter*, 145 Ohio St. 552; *State* v. *Moore*, 149 Ohio St. 226; *Whiteman* v. *State*, 119 Ohio St. 285, and *Barnett* v. *State*, 104 Ohio St. 298; *State* v. *Pack*, 18 Ohio App. 2d 76. Further this section dealing with evidence of like or similar acts of the defendant was held to be constitutional by the Court of Appeals in *State* v. *Hahn*, 59 Ohio App. 178. An appeal to the Ohio Supreme Court was dismissed (133 Ohio St. 440), the court holding that no debatable constitutional question was involved. On appeal to the Supreme Court of the United States; reported in 305 U. S. 557, 83 L. Ed. 351, 59 S. Ct. 75, the appeal was dismissed for the want of a substantial federal question. The above citations are in point in that they relate directly to the "like or similar act statute." Further, the defendant in *State* v. *Hahn* was convicted and sentenced for the crime of murder in the first degree in that he unlawfully administered a poison to the deceased. The

petitioner in the instant case, has been convicted and sentenced for unlawfully administering a poison to the victim, Raymond Kantra.

Petitioner cites *State* v. *Hirsch*, 1 O.O. 2d 349, however, it appears that the appellate court set aside the verdict of guilty therein since the convicted defendant was an aider and abettor to the principal, co-defendant who had been acquitted at the same trial and by the same jury which convicted appellant, Hirsch. Further, the court mentioned therein that the court and prosecutor referred to section 2945.59 as a "similar offense-statute" when they should have referred to it as a "similar act statute." This decision has no bearing on the instant case. Petitioner also mentions *State* v. *Herbert* 8 O.O. 382, however, the appellate court therein held that the trial court should have sustained appellant's motion for a new trial inasmuch as a juror on voir dire examination withheld information and denied having any connection with the injured party or complainant in the case when in fact he did have such connections. Further, the court held that it was an abuse of discretion for the trial court to permit the State to introduce ninety separate transactions which were purportedly like or similar to the one charged. This situation just does not appear in the instant case. The remaining two cases cited by petitioner do not involve the "like or similar act statute." (Revised Code 2945.59)

The Supreme Court of Ohio in *Clyne* v. *State*, 123 Ohio St. 234, held that the "like or similar act statute" was a rule of evidence and not a rule of substantive law. It appears that the Supreme Court of the United States cannot and will not ordain or promulgate state rules of criminal procedure for the various states. *Spencer* v. *State of Texas*, 87 S. Ct. 648. Also, the Court said in *Michelson* v. *United States*, 69 S. Ct. 213, that this court was not the best forum for developing rules of evidence for the lower

federal courts either. Those cases involved similar subject matter to that present in the instant case; namely, the past conduct of the petitioners therein for which they had already stood trial and had been convicted. It would appear that any possible prejudice to a petitioner would be far greater and more severe where a conviction is involved. This is not the situation in the instant case but rather conduct or acts which are like or similar to the one charged.

III. ANSWER TO PETITIONER'S ALLEGATION THAT THE INSTRUCTIONS OF THE COURT RELATIVE TO THE ALLEGED SIMILAR ACTS OF THE PETITIONER WERE SO CONFUSING AND CONTRADICTORY IN TERMS AND SO ABSENT OF INFORMATIVE VALUE AS TO UNDULY PREJUDICE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The Trial Court in charging the jury as to similar acts said:

> "There is evidence in this case which tends to show that the defendant committed like acts as the one charged in this case on or about February 2, March 16, July 6, July 8, July 16, and August 2, 1966, against Richard Critchfield, Johnnie C. Moles, Raymond Cutlip, Howard Richardson, Wayne Marcoux and Rollin Fahrenkamp, respectively, and as the court has said, the state claims that these other acts are somewhat similar to or like the act of February 24, 1966, charged in the indictment in this case."
>
> "Like and similar acts, when closely enough related as to time and place to the alleged acts charged in this case, may be shown for the limited purposes defined by section 2945.59 of the Ohio Revised Code, which in its pertinent parts reads as follows:
>
> > "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or

system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with, or prior or subsequent thereto . . ."

"As the court has said, evidence has been offered in this case tending to show that defendant committed other acts shortly prior or subsequent to February 24, 1966, that are or may be somewhat similar to or like the alleged acts in this case. This evidence, including the state's exhibits relative to such other acts, is not to be considered by you as proof that defendant committed the act for which he is now on trial, but it may be considered by you for the purposes of determining defendant's motive or intent, the absence of mistake or accident on his part, or a scheme, plan or system used by him."

"Keep in mind that this evidence is not to be considered by you as substantive evidence or proof of the commission of the offenses charged in this case; rather, you are limited in your consideration of such evidence to the purposes specifically set forth in section 2945.59, Revised Code, just read to you by the court." (T.R. 758, 759)

Obviously, the Trial Court did not simply quote Revised Code 2945.59 as is indicated in petitioner's brief but gave the jury a clear and complete instruction with regard to this rule of evidence and how it could be applied by the jury to the testimony and exhibits which had been introduced to it. Further, the Trial Court on several occasions during the course of the trial itself admonished the jury with regard to this type of evidence. (T.R. 204, 205) (T.R. 250) (T.R. 269, 270). Further, on page (T.R. 425) it appears that petitioner's counsel waived any further instruction by the court to the jury on this rule of evidence.

Petitioner asks whether a jury can be expected to distinguish between such technical criminal elements as motive, intent, absence of mistake or accident on his part or his scheme, plan or system of doing the act in question since the court did not inform the jury upon which of the issues the evidence was to be considered by them.

The obvious reason is because the evidence which was introduced pursuant to Revised Code 2945.59 was admissible for all of the issues or reasons listed in the statute. One can readily understand the relevancy of this evidence simply by reading the transcript of the testimony of the witnesses who testified in effect that the petitioner had perpetrated like or similar acts upon them. Further, it was not necessary for the jury to distinguish between motive, intent, absence of mistake or accident on his part, his scheme, plan or system of doing the act in question. This terminology is plain English, self explanatory and easily understood and all the terminology relates to the same subject matter which is the presence or absence of the defendant's intent. This type of language does not need further definition as would an abstract standard of proof such as "beyond a reasonable doubt."

Also, the Court specifically instructed the jury many times that this type of evidence was not to be considered by them as substantive evidence or proof of the commission of the offenses charged in this case.

IV. ANSWER TO PETITIONER'S ALLEGATION THAT THE REMARKS OF THE PROSECUTION, DURING SUMMATION TO THE JURY, DID CONSTITUTE HARMFUL ERROR WITHIN THE PURVIEW OF THE PETITIONER'S CONSTITUTIONALLY AFFORDED RIGHTS.

The Trial Court instructed the jury in part as follows at the conclusion of closing arguments:

> "at the opening of the trial, counsel for the state and defendant made statements as to what the evidence introduced in the case would show. The opening statements are not evidence, but were made so that you might better understand and follow the evidence as it was later introduced. Any part of such opening statements that may not have been supported by the evidence introduced in this case should be entirely ignored. The comments and arguments of counsel, and the comments of the court during the progress of the trial are not evidence in the case." (T.R. 762, 763)

The Court further said:

> "The facts are for your determination from the evidence. The evidence consists of what the witnesses have been permitted to say to you from the witness stand. . . . In arriving at your verdicts it is your strict and conscientious duty to exclude from your consideration anything that you may have observed or heard concerning this case which is not a part of the evidence. The importance of your duty as jurors requires that you should consider and weigh the evidence with great care, and arrive at just and fair verdicts, without fear of favor, without sympathy, passion or prejudice." (T.R. 763)

In addition thereto and immediately prior to the closing arguments of counsel for both sides the Trial Court had already cautioned the jury in part as follows:

> "Now, these statements (referring to closing arguments) they will make to you concerning the evidence will, I am sure, reflect the actual state of the evidence as much as is humanly possible, but should any of them make a statement that according to your best recollection of the evidence is not supported either in whole or in part by the evidence, you should disregard such statement and rely upon the evidence in the case as you recall it, either the testimony or the exhibits introduced in evidence constituting the evidence in the case.

> . . . but it is entirely up to you as to what the evidence shows. Your findings of fact will be controlling because you are the sole judges of the facts in the case. The court is the sole judge of the law." (T.R. 701)

Petitioner claims in his petition that the prosecutor misstated the facts when he referred to the amount of scopolamine that Raymond Kantra had and then proceeds to support that position by calling the court's attention to Dr. Nelson, a biochemist who testified that he had found atropine and scopolamine in the blood and gastric samples which were taken from Raymond Kantra and the tests he conducted was a qualitative one. However, he fails to point out that the jury had for its consideration a great deal of other testimony besides the testimony of Dr. Nelson which related directly to the condition of Raymond Kantra. There was the direct testimony of Raymond Kantra himself as to his condition before and after taking the scopolamine (T.R. 18 thru 38 and 63 thru 91) which testimony was corroborated by Mollie Taylor (T.R. 105, 106) and Andrew Papanek (T.R. 180 thru 185) both of whom testified as to the appearance, manifestations and condition of Mr. Kantra. Further, there was the testimony of Detective Tucker who testified that he had found several bottles of white pills, one of which was labeled scopolamine in the glove compartment of the petitioner's car. (T.R. 323) In addition, the jury was able to consider the expert testimony of William J. Miller (T.R. 334 thru 360) the expert testimony of Dr. Frank P. Cleveland, a toxicologist (T.R. 360 thru 387) and also the expert testimony of Dr. Thurston K. Batson (T.R. 571 thru 637) whose testimony related to amounts of scopolamine and the effects of a certain dosage on an ordinary individual. It is quite clear that the jury had many types of evidence for its consideration on this matter such as direct, circumstantial, scientific, medical, and expert testimony. The petitioner is attempting to take

a partial statement out of the context in which it is said and try to establish a certain significance to it without considering all the evidence in the case. The prosecutor's statement was based on the evidence and was fair comment.

The petitioner cites *Adams* v. *State*, 192 So. 2d 762, and *State* v. *Jones*, 124 N.W. 2d 727, but after a consideration of those decisions and the remarks made by counsel therein it becomes apparent that they have no application to the case at hand.

Also, petitioner claims that the prosecutor commented to the jury on petitioner's failure to take the witness stand and testify in his own behalf. He cites *Griffin* v. *California*, 380 U.S. 609 and *Desmond* v. *United States*, 345 F. 2d 225, neither of which are applicable to the facts in the instant case. The comment in *Griffin* was a direct reference to the defendant himself and his refusal to take the stand and testify. Further, the trial court in so many words, had instructed the jury that it could draw certain inferences from the defendant's failure to explain or deny facts within his knowledge and that those inferences unfavorable to the defendant are the more probable. The facts or comment in the instant case do not come within the holding of the *Griffin* case. It appears that trial counsel for the petitioner agrees with this conclusion.

> Mr. Rion: . . . "I think it is about as near a comment that the prosecution can make." (T.R. 710, 711)

Petitioner also claims that the remark can only be attributed to the petitioner's failure to testify and that the circumstances of the case in no way imposes an obligation upon Eva Green and Margaret Craft, the girlfriend and mother, respectively of petitioner *to know or explain the source of the articles seized.*

Perhaps, these defense witnesses had no obligation to explain the presence or source of the stolen merchandise

but they certainly were in a position to do so. Eva Green testified that she was present in a room at the Sheridan-Gateway Motel with the petitioner and Mr. Critchfield, who was drugged and robbed on or about February 7, 1966. Further, she testified that she was present with the petitioner and Rollin Fahrenkamp at petitioner's residence when Mr. Fahrenkamp was drugged and robbed on or about August 2, 1966. Eva Green admitted she took scopolamine with the petitioner on various occasions and that she shared the residence with petitioner at 137 N. Smithville Road and that on other occasions she would spend evenings and all night at that location. (T.R. 647 thru 673) (T.R. 684 thru 687) Mrs. Craft testified that she, too, had scopolamine in her possession and that she had taken them. (T.R. 688) The distinguishing point here is that this is not a case where the petitioner did not testify and also did not offer any witnesses in his behalf. Numerous witnesses were called by the petitioner and the facts, circumstances and evidence clearly show that they were in a position to explain the presence or source of the stolen items which they failed to do. Of course, because of the above reason the rationale of the *Desmond* case has no application to the case at hand.

The arguments of counsel must be judged in the entire context and for cases holding similar remarks as in the instant case not to be a comment on the defendant's refusal to testify. See *Martinez* v. *People*, 425 P. 2d 299; *Glass* v. *State*, 411 S.W. 2d 728; *Beecher* v. *State*, 193 So. 2d 505; *Patterson* v. *State*, 416 S.W. 2d 816; *State* v. *Bumpers*, 155 S.E. 2d 173; *State* v. *Costello*, 415 S.W. 2d 816.

The error, if any, is harmless. *Chapman* v. *California*, 87 S. Ct. 824; *People* v. *Ross*, 429, P. 2d 606; *People* v. *Boyden*, 60 Cal. Rptr. 271, *People* v. *Hudgins*, 60 Cal. Rptr. 176; *Walsh* v. *United States*, 371 F. 2d 135; *People* v. *Modesto*, 427 P. 2d 788; *People* v. *Baker*, 152 N.W. 2d 42.

V. ANSWER TO PETITIONER'S ALLEGATION THAT THE DENIAL BY THE TRIAL COURT OF THE PETITIONER'S MOTION FOR COPIES OF GRAND JURY TESTIMONY DID CONSTITUTE PREJUDICIAL ERROR.

Petitioner cites *Dennis* v. *United States*, 384 U.S. 855, and *Youngblood* v. *United States*, 379 F. 2d 365 to support his position. However, those cases dealt with convictions of defendants for violations of federal laws and trial procedures in federal courts. The Supreme Court in the *Dennis* case recognized the long established policy that maintains the secrecy of the grand jury proceedings in the federal courts. The Supreme Court therein was concerned with Rule 6 (e) of Federal Rules of Criminal Procedure which deals with the Secrecy and Disclosure of matters before grand jury. The trial court had overruled petitioner's motion for production of transcripts of grand jury testimony of four government witnesses who testified at the trial since there had been no showing of a "particularized need." The Supreme Court held in essence that the trial court committed an abuse of discretion when applying Rule 6 (e) to the facts in the *Dennis* case since the facts clearly showed a "particularized need." *Dennis* v. *United States*, 384 U.S. 855, at 872. The Supreme Court was exercising its supervisory power over federal courts, federal law and federal procedure. .

The trial court in the instant case had to apply the state rules of criminal procedure which encompasses Ohio Revised Code 2939.11. This statute and the opinion of the Supreme Court of Ohio in *State* v. *Rhoads*, 81 Ohio St. 397, bind the state trial courts to grand jury secrecy and are not allowed to order the prosecuting attorney to deliver grand jury minutes or transcripts of evidence taken to the defendant or his counsel.

The petitioner herein is well aware of the thrust and application of *Dennis* v. *United States* and its holding does

not involve a constitutional right but he attempts to bridge that gap by alleging that the Trial Court denied him his right to confront the witnesses against him and to prepare and present his defense.

This is an extremely tenuous proposition since the petitioner was present at his trial when the witnesses testified against him. Further, the petitioner was present at a hearing on a motion to suppress certain evidence and/or discovery hearing which took place prior to the trial itself and at which hearing the petitioner subpoenaed twenty witnesses who later testified on behalf of the State of Ohio. (M.S. 5) The Trial Court instructed petitioner as follows:

> "The Court: under the law you are permitted to talk to State's witnesses, and under the law you are permitted to take depositions." (referring to the State's witnesses) (M.S. 5)

Needless to say, petitioner does not cite any authority whatever for his vague allegation that he was denied his right of confrontation of accusers and that he was not able to prepare and present his defense simply because the Trial Court overruled his motion for production of grand jury transcripts of testimony at trial.

Finally, petitioner alleges in his brief at page 19 that respondent admits that the federal rule concerning the availability of grand jury testimony was violated. Perhaps, this is wishful thinking on the part of petitioner's counsel.

The respondent submits:

> (1) that 6 (e) of Federal Rules of Criminal Procedure and the holding of the Supreme Court in the *Dennis* case have no application to the case at hand.
>
> (2) that if the federal rule concerning the availability of grand jury testimony were applicable to the instant case the rule would not have been violated inasmuch as the Trial Court's ruling could not have

constituted an abuse of discretion with regard to the facts in the instant case which do not reflect any need whatever on the part of petitioner to have the grand jury transcripts.

(3) the facts in the instant case show that at the time of petitioner's trial, counsel was engaging in a belated fishing expedition and an untimely discovery technique and his request for the grand jury transcripts was a naked attempt without any showing of materiality, relevancy or need.

CONCLUSION

For the reasons stated herein and since petitioner does not state grounds which involve a substantial federal question, it is respectfully submitted that his petition for a writ of certiorari should be denied.

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